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 Peer Commentary



Uterus transplantation: does procreative liberty encompass a right to gestate?

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...wanting to have a biological child is neither a male nor female desire, but a human desire.¹

The latest innovation in the arena of assisted reproductive technologies is uterine transplantation (UTx), described as ‘a new type of quality of life enhancing, as well as a life-giving transplantation’.² The world’s first live birth of a child after uterus transplant occurred using a female living donor and recipient in Sweden in 2013.³ The primary purpose of UTx is to restore fertility in female patients with uterus factor infertility (UFI), which it is claimed affects approximately 1.5 million women worldwide.⁴

In his insightful paper, ‘Other women’s wombs: uterus transplants and gestational surrogacy’,⁵ Robertson notes the ‘important ethical and legal concerns’⁶ this advance raises and examines some of the ‘medical, ethical, legal, and policy issues that arise’.⁷ The focus of the paper is on UTx in women to restore fertility. Comparing UTx and gestational surrogacy, Robertson argues ‘if UTx becomes safe and effective, the case for offering UTx to all women with UFI is strong’.⁸ One key question that remains unclear is whether procreative liberty encompasses a right to ‘gestate’, and controversially, if there is such a right, whether it is restricted to women suffering from UFI. Whilst Robertson

¹ T. Beatie, *Labor of Love: Is Society Ready for this Pregnant Husband?*, THE ADVOCATE, Apr. 8, 2008 (accessed Aug. 12, 2016).

² M. Brannstrom, *Human Uterus Transplantation in Focus*, 117 (1) BRIT. MED. BULL. 69–78 (2016).

³ M. Brannstrom et al., *Livebirth After Uterus Transplantation*, THE LANCET 385 (9968) 607–16 (2015).

⁴ M. Brannstrom, *Human Uterus Transplantation in Focus*, 117 (1) BRIT. MED. BULL. 69–78 (2016).

⁵ John Robertson, *Other Women’s Wombs: Uterus Transplants and Gestational Surrogacy*, J. L. BIOSCI. 68–86 (2016).

⁶ Robertson, *supra* note 5, at 68.

⁷ Robertson, *supra* note 5, at 69.

⁸ Robertson, *supra* note 5, at 85.

describes UTx as a ‘technology as less dramatic in scope, but important for affected women’⁹ than other ART innovations. Two controversial questions surrounding UTx, not dealt with in his paper are whether, firstly, it can be argued there is a ‘right’ to gestate under the umbrella of procreative liberty that grounds a claim to positive assistance and public funding for the costly procedure; and secondly, the possibilities UTx raises in the future, to widen the reproductive options of transgendered individuals and men who may seek access to UTx and thus the prospect it raises for unisex gestation.

A RIGHT TO GESTATE?

Robertson’s paper ‘assumes that procreation and child rearing is a fundamental human right, and uterine infertility should not bar individuals from having genetic offspring when safe and effective techniques exist for alleviating their condition.’¹⁰ He concludes ‘that there is a sound ethical basis to allow surrogacy or transplant to be used by women with uterine factor infertility’.¹¹ The paper does not discuss directly whether procreative liberty encompasses specifically a right to gestate.

In a wealth of literature discussed in the context of assisted reproductive technologies to overcome infertility, it has been persuasively contended that people have a ‘prima facie’ right to procreative or reproductive autonomy.¹² Dworkin has defined the ‘right of procreative autonomy’ as ‘a right of people to control their own role in reproduction unless the state has a compelling reason for denying them that control.’¹³ Harris argues that in all democracies, the ‘democratic presumption’ is that individual choices will not be interfered with unless good and sufficient grounds can be produced for so doing.¹⁴ On the basis of this democratic presumption, the burden falls on those wishing to rebut such a presumption to prove that allowing the exercise of such a right would cause demonstrable harm.

In ‘Children of Choice’,¹⁵ Robertson who has substantially contributed to the literature on procreative liberty, sets out a theoretical framework that consists of three limbs. Firstly, it involves a ‘right’ to have genetically related children and a converse right not to. Robertson states: ‘The moral right to reproduce is respected because of the centrality of reproduction to personal identity, meaning and dignity.’¹⁶ Secondly,

⁹ Robertson, *supra* note 5, at 69.

¹⁰ Robertson, *supra* note 5, at 69.

¹¹ Robertson, *supra* note 5, at 69.

¹² R. DWORKIN, *FREEDOM’S LAW* (Oxford University Press, 1996); J. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* (New Jersey University Press, 1994); J. Harris, *Rights and Reproductive Choice*, in *THE FUTURE OF HUMAN REPRODUCTION* 5–37 at pp. 34–35 (John Harris, Soren Holm ed., Clarendon Press, 1998); J. Harris, *Sex Selection and Regulated Hatred*, 31 J. MED. ETHICS 291–94 (2005); B. Steinbock, *Regulating Assisted Reproductive Technologies: An Ethical Framework*, 6 WOMEN’S HEALTH ISSUES 167–74 (1996); J. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* (New Jersey University Press, 1994).

¹³ R. DWORKIN, *LIFE’S DOMINION* 48 (Harper Collins, 1993); R. LEE & S. MORGAN, *HUMAN FERTILIZATION & EMBRYOLOGY, REGULATING THE REPRODUCTIVE REVOLUTION* 29 (Blackstone Press, 2001).

¹⁴ J. Harris, *No Sex Selection Please, We’re British!*, 31 J. MED. ETHICS 286 (2004); J. Harris, *Sex Selection and Regulated Hatred*, 31 J. MED. ETHICS 291 (2003).

¹⁵ J. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* (New Jersey University Press, 1994).

¹⁶ Roberson, *supra* note 15, at 30.

although the right has ‘presumptive primacy’,¹⁷ Robertson suggests that it is not absolute and should be limited if the exercise of procreative liberty creates ‘harm’.¹⁸ He contends that it is those who seek to limit reproductive choice that should ‘have the burden of showing that the reproductive actions at issue would create such substantial harm that they could justifiably be limited.’¹⁹ Thirdly, Robertson argues that the right to procreative liberty is a negative one; the State cannot interfere in individuals’ personal reproductive choices, but crucially, it does not have any positive obligations to assist people with their reproductive decisions, rather that is a matter of a broader social policy and resource allocation.²⁰

Yet others have asserted it should be a positive right, since for individuals suffering from problems conceiving or gestating, the only way such individuals can exercise their procreative liberty is with the positive assistance of third parties and the state.²¹ In the context of UTx some commentators have tackled the thorny question of whether in countries with a publicly funded system, such as the United Kingdom a case can be made for the public funding of UTx.²² Whilst Robertson notes UTx is a costly procedure, and the difficulties of posing surrogacy as an alternative²³ for women for whom surrogacy may go against the religious, cultural or personal reasons, the issue of whether UTx could be regarded as a positive right entitling women with UFI to positive assistance to this costly procedure is not dealt with in his paper but is now a debate that has to be revisited. This will be particularly true in countries such as the United Kingdom that do offer public funding for IVF, where it could be argued, just as IVF assists couples having difficulty in ‘conceiving’, UTx once safe, will assist women having difficulty ‘gestating’.

UTx IN TRANSGENDERED INDIVIDUALS AND MEN

UTx in Transgendered individuals

Whilst all UTx research trials to date have involved women, where it is designed to restore natural function, UTx raises the more complex questions of whether others besides women may claim a ‘right to gestate’, where it could be used to advance/enhance natural function. Following on from the news that a healthy child had been born following an UTx, headlines followed that this raised the prospect women may seek access to UTx, so that they too can experience pregnancy and the gestation of their own

¹⁷ J. A. Robertson, *Liberalism and the Limits of Procreative Liberty: A Response to My Critics*, 52 WASH. & LEE L. REV. 233 (1995).

¹⁸ Note that theoretical interpretations of ‘harm’ have varied.

¹⁹ Robertson, *supra* note 15, at 25.

²⁰ Robertson, *supra* note 15, at 264.

²¹ R. Sparrow, *Is it ‘Every Man’s Right to Have Babies if He Wants Them?’ Male Pregnancy and the Limits of Reproductive Liberty*, 18 KENNEDY INST. ETHICS J. 275–99 (2008).

²² S. Wilkinson & NJ Williams, *Should Uterus Transplants be Publicly Funded*, 42 (9) J. MED. ETHICS 559–65 (2016). Also see the three responses to the article: A Alghrani, *Yes, Uterus Transplants Should Be Publicly Funded!*, 42 (9) J. MED. ETHICS 566–67 (2016); J. Balayla, *Public Funding of Uterine Transplantation*, 42 (9) J. MED. ETHICS 568–69 (2016) and M. Lotz, *Commentary on Nicola Williams and Stephen Wilkinson: ‘Should Uterus Transplants Be Publicly Funded?’*, 42 (9) J. MED. ETHICS 570–71 (2016).

²³ Robertson, *supra* note 5, at 70.

children.²⁴ Transgenderism is an extreme form of gender dysphoria²⁵ and psychologically, transgendered individuals regard themselves as being of the opposite gender to that which they belong to on purely physiological criteria.²⁶ Brothers and Ford elaborate on the condition further:

Gender dysphoria and gender identity disorder are terms used to describe a persistent desire to be of the opposite sex combined with persistent discomfort about one's assigned sex or gender role. The diagnosis requires the absence of physical intersex conditions and the presence of clinically significant distress or impairment of psychological function.²⁷

For trans women, surgical treatment combined with hormonal therapy has now advanced significantly so that such individuals can attain the appearance of a woman. Post-surgery, in many instances, unless disclosed by the individual, very few would know that the individual had undergone such treatment. While surgery has been successful in this context and relieved the pressures of individuals suffering from gender dysphoria, such individuals are still constrained in their reproductive capacity. It has been noted that transgendered individuals also have 'reproductive needs',²⁸ and among trans women there may be strong desires to parent and gestate a genetically related²⁹ child of their own.

Trans women could regard pregnancy as the final step in re-aligning their life in accordance with the gender they psychologically identify with, as opposed to their biological sex. UTx may remedy this, enabling trans women to experience gestational motherhood. There will be concerns regarding how safe such a procedure would be, as UTx into a biologically male body will give rise to more difficulties than performing such a procedure in a female body. Brännström, acknowledged that transgendered pregnancy may in theory be a possibility, but raised his ethical reservations and warned of the anatomical barriers that would have to be overcome:

It should be technically possible, but I don't know if it's ethical. The pelvis of men also is not exactly the same shape as the pelvis of women, and that might pose problems.³⁰

If safety and efficacy concerns are met, does procreative liberty encompass a right to gestate, and if so, does it extend to trans women? Robertson's paper does not consider UTx

²⁴ Dina Fine Maron, *How a Transgender Woman Could Get Pregnant*, SCI. AM., June 15, 2016, <http://www.scientificamerican.com/article/how-a-transgender-woman-could-get-pregnant/> (accessed Aug. 12, 2016). Leah Samuel, 'With Womb Transplants a Reality, Transgender Women Dare to Dream of Pregnancies' STAT Reporting from the Frontiers of Health and Medicine, Mar. 7, 2016, <https://www.statnews.com/2016/03/07/uterine-transplant-transgender/> (accessed Aug. 12, 2016).

²⁵ P. Sutter, *Gender Reassignment and Assisted Reproduction: Present and Future Options for Transsexual People*, 16 HUM. REPROD. 612–14 (2001).

²⁶ J. Thomson, *Transsexualism and Access to a Child*, 8 J. MED. ETHICS 72 (1982).

²⁷ D. Brothers & W.C. Ford, *Gender Reassignment and Assisted Reproduction: An Ethical Analysis*, 15 HUM. REPROD. 737–38 (2000).

²⁸ A. Lawrence et al., *Health Care Needs of Transgendered Patients*, 276 J. AM. MED. ASSOC. 874 (1996).

²⁹ A male to female transsexual can have a genetically related child if their gametes are stored prior to sex reassignment surgery. *In vitro* fertilization can then be undertaken to fertilize the spermatozoa with donated ova to create an embryo that can then be implanted into a transplanted uterus.

³⁰ M. Henderson, *How Mother and Daughter Could Share the Same Womb*, THE TIMES, July 2, 2003 (accessed Aug. 12, 2016).

in the context of transgendered women. Yet in countries such as the UK, which provides legal recognition to transgendered women who have transitioned,³¹ and whom are offered the same legal rights as their female counterparts, this will become a pertinent question if UTx is offered as clinical treatment in women.³² Furthermore questions will arise as to whether this should be publicly funded.

More controversially, if it is discovered how to achieve safe gestation via UTx in trans women, by default, scientists will have discovered how to achieve male pregnancy.

UTx in men: advancing, enhancing, or destroying human nature?

Robertson argues UTx will not help 'gay males who are seeking offspring'³³ but one of the controversial issues raised by this advance is the possibility that science may overcome anatomical barriers to transplant a uterus not only into women, but men also. This prospect has not been missed by the media, which has featured headlines such as 'Scientists are Now Attempting to Figure out How to Get Men Pregnant'³⁴ and 'Will Uterine Transplants Make Male Pregnancy Possible?'³⁵ Notions of male pregnancy are not new, in the 1980s, the biological possibility of extra uterine pregnancy led to tabloids reporting that 'the era of pregnant men had arrived'. Teresi and McAuliffe noted the high level of response by men who wanted to experience pregnancy:

The story struck a nerve in many men. Scientists doing work on the cutting edge of human reproduction were barraged with letters from men who wanted to be mothers. Some were transsexuals. But others were conventional men who simply wanted to experience the joys of pregnancy.³⁶

Men who may seek to utilize UTx could be heterosexual, allowing for the couple to jointly share the reproductive burdens and joys of pregnancy in both gestating a child each. Homosexual couples may also wish to procreate in this fashion, one of them donating the sperm whilst the other gestates the baby; involving both in the reproductive process and avoiding the need for a surrogate. Single men may also wish to opt for this procedure, avoiding the legally uncertain route of commissioning a surrogate.³⁷

On whether procreative liberty may provide grounds for men to argue a right to gestate, Sparrow argues that given the role played by the right to reproductive liberty in other debates about reproductive technologies, it will be extremely difficult to deny that this right extends to include male pregnancy. However, he asserts that

³¹ A transsexual woman, who has obtained legal recognition of her chosen gender under the Gender Recognition Act 2004 is, in a legal context, to be treated the same other women.

³² Under the legislative frameworks which would govern gender reassignment and UTx; The Gender Recognition Act 2004, The Human Fertilization and Embryology Act 1990 (as amended in 2008) and The Human Tissue Act 2004, transsexual women are legally entitled to be treated consistently with their female counterparts.

³³ Robertson, *supra* note 5, at 70.

³⁴ Micaiah Bilger, *Scientists are Now Attempting to Figure out How to Get Men Pregnant*, LifeNews.com, June 20, 2016, <http://www.lifeneews.com/2016/06/20/scientists-are-now-attempting-to-figure-out-how-to-get-men-pregnant/> (accessed Aug. 12, 2016).

³⁵ Denise Grady, *Will Uterine Transplants Make Male Pregnancy Possible?*, http://www.nytimes.com/2015/11/16/insider/will-uterine-transplants-make-male-pregnancy-possible.html?_r=0 (accessed Aug. 1, 2016).

³⁶ D. Teresi & K. Mc Auliffe, *Male Pregnancy*, in *SEX / MACHINE: READINGS IN CULTURE, GENDER AND TECHNOLOGY* 175 (P. D. Hopkins ed., Indiana University Press, 1998).

³⁷ The Surrogacy Arrangements Act 1985. Note section 59 of The Human Fertilization and Embryology Act 2008 amends this statute.

'this conclusion constitutes a "reductio ad absurdum" of the idea of reproductive liberty as it is currently used in bioethics. Any notion of a right to reproductive liberty that extends as far as a man's right to gestate has lost contact with the facts about the biology of reproduction and its significance in a normal human life that made it plausible to defend the existence of such a right in the first place.'³⁸

He therefore advises that the extent of this purported right in other contexts in which it is deployed needs revisiting.

CONCLUSION

Robertson's paper addresses many of the issues raised by UTx in women, but the paper is confined to discussing the immediate purpose of UTx, namely as treatment to restore natural function in women suffering uterine factor infertility. The more controversial prospects generated by the advance are not the focus of his paper. As one of the great writers on procreative liberty, it would be interesting to know his perspective on whether procreative liberty encompasses a right to gestate and whether this is limited to women, or whether trans women and men can also assert a right to gestate, should science conquer this last frontier.

Whilst the author acknowledges that it may be the case that UTx in men (enabling either gender to gestate) is never possible; if scientists do conquer this last frontier, it will revolutionize reproduction as we know it and raise a plethora of legal, ethical, and social issues which regulators will have to grapple with. Waiting until these technologies are possible to debate these questions is imprudent, for new technologies are marked by the rapidity at which they develop. It might be that unisex gestation is a step too far, and just because science may one day render this possible, does not mean we should do it; but the period to contemplate it, is now, rather than reactive ad-hoc measures and responses, as are so often the case in the arena of assisted reproductive technologies.

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³⁸ R. Sparrow, *Is it 'Every Man's Right to Have Babies if He Wants Them?' Male Pregnancy and the Limits of Reproductive Liberty*, 18 (3) KENNEDY INST. ETHICS J. 275–99 (2008).